

IN THE MATTER OF the Human Rights Code R.S.O. 1990, c.19;

AND IN THE MATTER OF the Complaint of

John Tam, dated November 23, 1985,
alleging discrimination in employment on the basis of
age and handicap by Inglis Ltd. and Nick Vuk.

LIST OF APPEARANCES

Preliminary Hearing April 5, 1993

Counsel:

Ontario Human Rights Commission

Ms. C. Bickley

Inglis Ltd. and Nick Vuk

Mr. T. Stefanik

Communications, Energy and Paperworkers'
of Canada

Mr. P. Cavalluzo

Ms. K. Schucher

Complainant:

Mr. John Tam, on his own behalf

Witnesses:

D. J. Rupert

H. Gale

Observers:

L. Pattison

F. Wolf

INTERIM DECISION

The Board of Inquiry was appointed on October 27, 1992, by the Minister of Citizenship, the Honourable Elaine Ziemba, in respect of the complaint of John Tam against Inglis Ltd. and Nick Vuk, alleging discrimination in employment on the basis of age and handicap, in violation of section 5 and 9 of the Human Rights Code, (formerly sections 4 and 8 of the Code as it then was).

The hearing commenced by conference call on November 23, 1992, at which time hearing dates were scheduled and a preliminary issue raised, namely a motion by the Respondent Employer, for an order adding as a second Respondent the union to which Mr. Tam belonged. The union at the time of Mr. Tam's complaint in 1985 was the Communication Workers' of Canada ("CWC") This union merged with the Communications, Energy and Paperworkers' of Canada ("CEP") in 1992.

Written arguments with respect to this preliminary issue were exchanged between the parties and received by the Board prior to an oral hearing to address this motion on April 5, 1993. The Commission supported the Employer's motion and the Union opposed it, arguing it would be prejudiced both in substance and process if it were to be now added as a party.

The Issue

The issue in the preliminary motion is whether or not the Union should be added as a party to these proceedings.

It should be noted that, in this case, there were two union mergers - one in 1984 and the one already referred to in December, 1992. The union representing Mr. Tam in 1983 was the International Union of Electrical, Radio and Machine Workers (IUE) which merged in February 1984 with Communications and Electrical Workers of Canada (CWC) which in turn merged with CEP in December 1992. It was acknowledged that while Local 545, at the plant where Mr. Tam worked, ceased to exist when that plant closed in November, 1991, CWC, the national entity, continued to exist and was a party to the merger with CEP in December 1992. Further references to "the Union" are meant to include CEP and its predecessors CWC and IUE.

By section 39(2), the parties to a proceeding before a Board of Inquiry are the Commission, the complainant, persons who the Commission alleges infringed a right under the Code, and by s. 39(2)(d):

"any person appearing to the board of inquiry to have infringed the right".

Parties added under section 39(2)(d) may be added "at any stage of the proceeding upon such terms as the board considers proper" (section 39(3)).

Evidence

The Panel heard sworn testimony from Ms. Rupert, president of the Union Local 545 at all relevant times, and from Mr. Gale, an investigator who had charge of Mr. Tam's file at the Commission in 1989. The Commission submitted typed copies of handwritten notes from the Commission file - one reporting a meeting with the Union on February 16, 1987, and the other reporting a telephone conversation with the president of the Union on October 4, 1989.

Reasons

1. Background Facts

On November 23, 1985, Mr. Tam filed a complaint with the Commission, alleging discrimination on the basis of age and handicap in his employment. Named in the complaint were the employer, Inglis Ltd., and Nick Vuk, his foreman. The events triggering the complaint occurred two years previously in 1983. Mr. Tam stated in his complaint that he had strained his back at work on March 11, 1983 and was on sick leave until August 31, 1983. He collected unemployment insurance while placed on "a waiting list for job

call back". He was not called back and he alleged that the company was "refusing to hire (him) because of (his) age and (his) handicap".

The Employer's response in 1986 referred to the collective agreement between it and the Union. In November 1986 the Employer wrote to the Commission asking it to provide the Union with notice, "as it would appear that the Union has a direct interest in the outcome of the proceeding, should such a proceeding entail."

There was no evidence submitted to suggest that the Commission acted on this request other than that Mr. Gale testified that it was because of this letter that he formed the opinion in 1989 that the Union should be added as a party. However, the only action taken by him was a telephone call to Ms. Rupert, the Union president, on October 4, 1989. He described the purpose of the call. It was to advise the Union of his opinion as to its responsibilities in the matter in the hope that it would take action which would settle the complaint.

Ms. Rupert said that she had no specific recollection of this call, but it was not contended that the call had not occurred. Counsel for the Union suggested that Mr. Gale's written report of the conversation might be inaccurate, given the language used and an apparently inaccurate reference to the workplace being a

"closed shop". It is the submission of the Union that it first heard of the possibility of its being added a party to Mr. Tam's complaint in November, 1992.

2. Arguments

The Employer contends that the Union specifically refused to allow Mr. Tam to displace any senior employees in a particular job class and that the Company was effectively prohibited from accommodating Mr. Tam's disability within the bargaining unit.

The Commission supports the Employer's application, adding that without the Union being added as a party, the Board could not address the full circumstances of the case and make appropriate remedy.

The Union states that it would ^{be} unfairly prejudiced if it were to be added as a party 10 years after the events triggering the complaint, 7 years after the complaint was made, and over a year after the Local in question had dissolved and destroyed its records. The Union does not dispute CEP's liability for actions of Mr. Tam's local (545) when it was with IUE or CWC. Rather, the Union submits that since the local was dissolved in 1991, as a result of the closure of the plant at which Mr. Tam worked, no remedy could be made regarding Local 545. His argument is that the national union would be prejudiced if added as a party since it had no notice of the complaint until November 1992.

The Union submits that CEP would be denied an opportunity to meet the case against it, citing the passage of time and stating that Local 545's records had been destroyed in late 1991 or early 1992.

3. Findings

The Board accepts for the purposes of this application that the Union, both nationally and locally, was not formally given notice that it was considered a party to the complaint by the Commission. Whatever was conveyed to Ms. Rupert as president of Local 545 in 1989 by Mr. Gale, regarding the Commission's view of the Union's responsibilities under the Code, nothing was done to bring the Union in as a party to the ongoing investigation and handling of Mr. Tam's complaint.

Counsel for the Commission confirmed that the Commission had taken the view that unions could be added as parties to complaints regarding accommodation in employment, for some time prior to the Supreme Court of Canada decision in Renaud v. The Board of School Trustees, School District Number 23 (Central Okanagan) in the fall of 1992. This case held that a B.C. union had a duty to accommodate an employee under human rights legislation in British Columbia. Counsel for the Commission submitted

simply that the Commission's handling of the complaint "may not have been perfect" as an explanation as to why the Union had not been added as a party earlier.

The Board accepts that the Employer raised the Union's involvement in its response to Mr. Tam's complaint as early as 1986 and indeed suggested that notice be given to the Union as an interested party. It was not until after the Renaud decision, however, that the Employer again pursued its request to have the Union added as a party to the complaint.

4. Case Law

There was no dispute as to the Board's discretion to add the Union as a party pursuant to s. 39(3). As stated by the Board of Inquiry in O'Sullivan v. Amcon Management et al (February 22, 1993) at page 5:

Boards of inquiry commonly add a person as a respondent to a complaint if it appears the respondent was involved with the actual incidents germane to the complaint and no prejudice would result by reason of the delay in becoming a party.

In O'Sullivan, the Commission sought to add a successor union to a complaint. In that case, the Energy & Chemical Workers Union (ECWU) merged with the Communications, Energy and Paperworkers Union of Canada (CEP) (on December 1, 1992) and CEP was found to have assumed the ongoing obligations of ECWU, one of the respondents named in the complaint to the Commission.

With respect to onus, the Board is of the view that while the person who is seeking to have another added as a party must establish involvement by that person "with the actual incidents germane to the complaint", in most cases, the person objecting to being added as a party must establish that "prejudice would result by reason of the delay".

5. Conclusion

The Employer has established that the actual incidents germane to this complaint - i.e. the accommodation of Mr. Tam in the workplace - involved the IUE and CWC through their Local 545. That the local for this workplace has since dissolved does not negate this involvement. CEP, as successor to IUE and CWC in this case, assumes ongoing obligations, if any, resulting from the union's relationship with the Employer and Mr. Tam at the relevant times in his complaint.

The next question is whether the Union has established that the granting of the Employer's application to add it as a party at this stage would result in prejudice by reason of delay. While some records have been destroyed by former officers of Local 545, it was apparent from Ms. Rupert's testimony that not all records were destroyed - a minute book, at least, remained. Further, it appears that Ms. Rupert as president of the local for over 23 years and as an employee with the Employer for almost 40 years would know jobs available at the plant and the union's positions at the relevant times. As a witness, she demonstrated ability to recall details. She was personally aware of the complaint brought by Mr. Tam against the Employer as well as the circumstances of job availability in the plant and the terms of the collective agreement at the time. She also met with a Commission investigator regarding Mr. Tam's complaint in 1987 and could recall the substance of Mr. Tam's claims at the time.

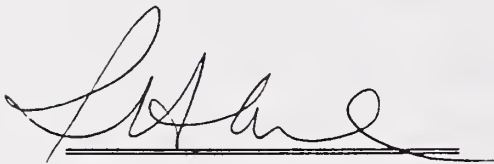
Boards of Inquiry have dealt with prejudice in terms of delay in preliminary motions for dismissal of complaints. The length of time involved in the delay is not determinative. As stated in Shreve v. City of Windsor (March 3, 1993 interim decision):

To justify dismissal, delay must result in serious prejudice to the ability of the Respondent to present its case.

The Board's role under section 39 is to determine whether a right under the Code has been infringed, and if so, by whom, and what remedies are appropriate. The Union and the Employer were parties to a collective agreement cited in response to Mr. Tam's complaint that a right had been infringed. In the Board's view, it is appropriate to add the Union as a party to the proceeding in accordance with section 39(2)(d). The Board cannot conclude on the information before it at this time that the Union would be unfairly prejudiced by reason of the delay in this case in becoming a party to the proceedings.

The hearing will reconvene on May 6, 1993 at which time the Commission will present its case, with the Employer and Union responding.

Dated at Toronto this 26th day of April, 1993.

A handwritten signature in cursive script, appearing to read 'Ruth Hartman', is written over a horizontal line.

Ruth Hartman